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No. 614

IN THE

Supreme Court of The United States

October Term, 1962

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
MICHIGAN CONSOLIDATED GAS COMPANY,
COUNTY OF WAYNE, MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. The Commission's Brief in Opposition claims that the decision below here (and the earlier decision in *City of Detroit*) do not conflict with *Wisconsin* v. *Federal Power Commission*, 303 F. 2d 380 (C.A. D.C.), now before this Court as Nos. 72, 73 and 74 this Term, or with the decisions of this Court such as *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591. According to the Commission, Panhandle's assertion of such a conflict is predicated on the misconception that the Commission used the cost of service method here because compelled by *City of Detroit*, whereas the Commission asserts that it used that method here "simply because it was the only appropriate method of fixing just and reasonable rates for Panhandle *on the record in this case*" (italics in original) (Br. in Opp. p. 9).

But the court below did not so read the Commission opinion. This is apparent from the Court's opinion where,

after summarizing briefly its holding in *City of Detroit*, the Court stated (Pet. App. A-3):

> "On April 27, 1961 the Commission issued an opinion and order (269-A, G-1116), modifying its former opinion (269) to accord with our decision in the *City of Detroit* case."

And since the Commission's opinion purports on its face to be applying the "difficult" "test required by the court in the *City of Detroit* case" (R. 432), it is plain that the rule prescribed in that opinion was not disregarded.

Moreover, examination of the Commission's arguments in support of its thesis (Br. in Opp., pp. 9-12) discloses that, despite its protestations to the contrary, the present Commissioners (as well as their predecessors) regard the insistence in *City of Detroit* upon the use of the cost of service formula as of significance. Thus, the Brief in Opposition states (p. 11, fn. 5) that

> ". . . the present Commission adheres to the position stated in the opinion here that it is legally free to depart from cost-of-service concepts in pricing a pipeline's gas production *to the extent that a record presents an adequate basis for moving to a more appropriate pricing basis*" (italics supplied).

This is merely another way of saying that the Commission regards itself as *not* "legally free" to disregard the cost formula in pricing a pipeline's gas production, and as under a legal obligation, at least presumptively, to apply the cost of service formula to pipeline produced gas—or, in other words, that a burden is still on the pipeline to show in each record on a comparative basis that another method is "more appropriate".[1]

[1] Since this requires cost rate base evidence at least as a basis for comparison, it is totally inconsistent with the Commission's exclusion from current independent producer rate proceedings of evidence as to cost of service of individual producers. E.g. *Skelly Oil Co.*, Op. No. 362, Aug. 30, 1962, 28 F.P.C.—. Certainly no such differentiation between pipeline and independent producers is justified as a matter of law.

This Court's decisions in the *Hope* and other cases cited at page 11 of the Petition establish that the Commission is not so confined—that the Commission is not "bound to the use of any single formula or combination of formulae * * *" (320 U.S. at 602), but only to reach a fair and reasonable end result. This must mean that it is not bound to any formula at the commencement of a proceeding, even presumptively. The statute and the *Hope* case require a pipeline to establish only that the rates it is proposing are fair and reasonable in result—without having also to show as a matter of law their relationship to the cost formula.

The theory now espoused by the Commission thus basically embodies the same fundamental error of law as *Detroit*, and this will infect all pipeline rate litigation. The need for setting the Commission straight on such an important question of law clearly warrants review by this Court.

The Commission says that it did not in this case invoke its freedom to "depart from the individual-company cost-of-service approach" (Br. in Opp. p. 11) because "it concluded that the 'evidence as to why something more than cost is necessary' was 'insufficient' (R. 430)" (Br. in Opp., pp. 11-12). But the repeated references to the record in these proceedings as justification for the Commission's use of the cost of service method ignore the fact that this record was made in compliance with the remand of the court below in *City of Detroit*, in which the court had reversed the Commission's pricing of Panhandle's produced gas on a non-cost basis and required the use of the cost rate base method at least as a point of departure. For the Commission now to attempt to support its decision on the ground that a record made under such restrictions is insufficient to justify use of a pricing approach other than cost is obviously to attempt to lift itself by its own bootstraps.

2. The Brief in Opposition (pp. 13-14) asserts that because petitioner had not actively undertaken during the rate period the exploration needed to maintain deliverability, it could "conjecture any size program of hypothetical disbursements it wished. * * *" This is neither accurate in itself nor a fair statement of petitioner's position, which is that the rate payers during any period should pay the actual cost of maintaining the producing company's ability to deliver gas at the same level. The program which Panhandle presented to the Commission was designed to establish rates which would meet this need. There is nothing conjectural about the amount needed to maintain petitioner's ability to deliver gas at the 1955-1958 levels, or about its commitment to undertake the exploration needed for that purpose once the funds needed therefor were authorized by the Commission. The amount required for this purpose is simply not provided through an allowance covering the cost of non-productive drilling and other activities, and a depreciation charge based on the cost of productive wells many of which were drilled many years before (see Petition, pp. 17-18). The public interest in continuous maintenance of an adequate supply of gas requires that fact, not theory, should govern with respect to providing the necessary funds.

The Brief in Opposition says (pp. 15-16) that the Commission should not have allowed the total sum which petitioner claims to have been needed for the maintenance of deliverability. The issue here, however, is not as to how much might have been allowed. That would be for the Commission to consider on a remand. The Commission's error lay in deeming itself bound by the *Detroit* case formula to allow *nothing* additional for this purpose, on the mistaken notion that because the amount was not spent before it was known whether the Commission would make an allowance for it, or how much, it was "hypothetical."

3. The Brief in Opposition filed by Wayne County says that the petition for certiorari is premature because the

entirely separate matter of gasoline extraction profits was remanded to the Commission for redetermination. That issue, upon which petitioner prevailed below, is entirely different and independent from the question as to the method of fixing rates for pipeline produced gas presented by the petition for certiorari. No matter how the former be decided by the Commission, the question before this Court will remain unaffected. The important problem raised by the petition here is thus not "premature" in any sense.

We add only that the same argument was made in opposition to the Commission's petition for certiorari in the *City of Detroit* case, although there the remand to the Commission by the Court of Appeals was on the principal rate question as well as on the gasoline extraction point. If this Court had *then* reviewed and reversed the *Detroit* decision, many years of fruitless, confusing and cumbersome efforts to regulate the pricing of gas production in an impossible way might have been avoided.

Respectfully submitted,

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